Supreme Court, U.S.
FILED
MAR 20 1998

(2)

No. 97-1244

In the Supreme Court of the United States

OCTOBER TERM, 1997

GIBBS INTERNATIONAL, INC.
F/K/A GIBBS TEXTILES, INC., PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the documents sought by petitioner under the Freedom of Information Act were properly withheld because "such disclosure would * * * seriously impair Federal tax administration" (26 U.S.C. 6103(e)(7)).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A4-A6) and the opinion of the district court (Pet. App. A1-A2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1997. The petition for certiorari was filed on January 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of 5 U.S.C. 552 and 26 U.S.C. 6103 are set forth in the petition (Pet. 2-4).

STATEMENT

1. Petitioner buys and sells textile machinery and is the sole shareholder of a German corporation named Gibbs GmbH. The latter corporation acts as agent for petitioner and also conducts business on its own account. On December 15, 1995, the German tax authority seized certain business records of Gibbs GmbH. Those records were returned by the German tax authority on February 26, 1996 (Pet. 5; see also Pet. App. A5).

On January 18, 1996, petitioner filed a Freedom of Information Act request with the Internal Revenue Service seeking records of communications between the IRS and the German tax authority concerning petitioner or its subsidiaries. In response to that request, the IRS identified two documents: (i) a one-page "cover letter from the Assistant Commissioner (International) to a foreign Competent Authority proposing a Simultaneous Examination of [petitioner] and one of its foreign subsidiaries" and (ii) the four-page Simultaneous Examination Proposal (Pet. App. A7-A9).*

The IRS declined to disclose the responsive documents. Exemption 3 of the Freedom of Information

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* The United States and Germany are parties to the Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes, Aug. 29, 1989, S. Treaty Doc. No. 101-10 (1990). The term "Competent Authority" refers to the entity that is authorized to act on behalf of each party to the treaty. The Competent Authority for the United States under this treaty is the Assistant Commissioner (International) of Internal Revenue. See I.R.S. Deleg. Order No. 114 (Rev. 9), 1990-2 C.B. 326.

Act exempts from disclosure any document that is protected from disclosure by other statutes. 5 U.S.C. 552(b)(3). Section 6103(a) of the Internal Revenue Code bars the disclosure of tax "return information" (26 U.S.C. 6103(a)) even to the taxpayer unless the Secretary of the Treasury "determines that such disclosure would not seriously impair Federal tax administration." 26 U.S.C. 6103(e)(7). Because the requested information was "return information" (as that term is broadly defined in Section 6103(b)(2), and because the agency "concluded that the disclosure of the documents would chill future cooperation with foreign government treaty partners" (Pet. App. A1) and thereby "impair Federal tax administration" (26 U.S.C. 6103(e)(7)), the agency withheld the documents.

2. a. Petitioner brought this suit to compel the agency to produce the requested documents. The IRS filed an affidavit that explained that release of the documents sought by petitioner "would chill the future cooperation of foreign governments and tax treaty partners" and would thereby "severely hamper[]" enforcement of the tax laws and "seriously impair Federal tax administration" (Pet. 6). After reviewing the requested documents *in camera*, the district court concluded that the agency had "reasonably" determined that disclosure would chill future cooperation with foreign government treaty partners (Pet. App. A1). The court therefore agreed with the agency that the documents are barred from disclosure under 26 U.S.C. 6103(e)(7).

b. The court of appeals affirmed in a brief *per curiam* opinion (Pet. App. A5-A6). After reviewing the documents *in camera*, the court of appeals con-

cluded simply that there was "no error in the district court's decision" (*id.* at A6).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The Freedom of Information Act "expressly recognizes * * * that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." *Baldrige* v. *Shapiro*, 455 U.S. 345, 352 (1982). Exemption 3 allows an agency to withhold information if another statute prohibits disclosure either by application of "particular criteria for withholding" or by reference "to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)).

Section 6103 of the Internal Revenue Code is a nondisclosure statute within the meaning of Exemption 3. *Tax Analysts* v. *IRS*, 117 F.3d 607, 611 (D.C. Cir. 1997); *Aronson* v. *IRS*, 973 F.2d 962, 964 (1st Cir. 1992); *DeSalvo* v. *IRS*, 861 F.2d 1217, 1221 n.4 (10th Cir. 1988); *Chamberlain* v. *Kurtz*, 589 F.2d 827, 838-839 (5th Cir.), cert. denied, 444 U.S. 842 (1979). Section 6103 provides generally that tax "[r]eturns and return information shall be confidential" and are not to be disclosed except as specifically authorized under the Internal Revenue Code. 26 U.S.C. 6103(a). Even when a taxpayer seeks a copy of its own tax "return information," Section 6103(e)(7) authorizes disclosure only if "the Secretary determines that such disclosure would not seriously impair Federal tax admini

stration." 26 U.S.C. 6103(e)(7). The term "tax administration" is defined for this purpose to include "the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party." 26 U.S.C. 6103(b)(4)(A)(i).

b. It is undisputed that the records withheld in this case constitute "return information." Those records therefore may be disclosed only if "the Secretary determines that such disclosure would not seriously impair Federal tax administration" (26 U.S.C. 6103(e)(7)). In a judicial challenge to an agency's withholding decision, moreover, the Freedom of Information Act provides that "the court shall determine the matter de novo." 5 U.S.C. 552(a)(4)(B). Petitioner asserts that the district court failed to conduct a *de novo* review of the agency's determination to withhold the records and instead "applied the arbitrary and capricious standard of review in upholding the IRS' refusal to disclose the information" (Pet. 10).

That contention is simply inconsistent with the record of this case. The affidavit filed by the agency in this case stated that disclosure of the requested documents would interfere with cooperation between the United States and its treaty partner and would therefore impair federal tax administration. The district court nonetheless concluded that it was required to "examine those documents *in camera* and * * * make a *de novo* determination" of the merits of the asserted exemption (C.A. App. 113). After conducting that *in camera* review, the court determined that the agency had "reasonably concluded" that disclosure of the documents "would chill future coopera-

tion with foreign government treaty partners" (Pet. App. A1).

The district court expressly provided petitioner with the *de novo* review that the statute requires. The district court evaluated for itself—through an *in camera* inspection—whether the stated basis for withholding the documents was adequate to justify their nondisclosure. That *de novo* review of the decision to withhold the documents is precisely what the Freedom of Information Act commands.

2. a. Petitioner contends that "the standard for reviewing claims of exemption under section 6103 differs widely from circuit to circuit" (Pet. 9, 10). Petitioner asserts that some circuits engage in a *de novo* review of claims of exemption for "return information" arising under Section 6103 while others review only whether the Secretary has acted in an arbitrary and capricious manner. That asserted conflict does not merit review by this Court in this case for several reasons: (i) the IRS conceded in the courts below that the district court is to conduct a *de novo* review of the agency's determination (C.A. App. 110 ("the standard of review under a FOIA case is a *de novo* standard of review")); (ii) the district court expressly applied a *de novo* standard of review (*id.* at 113 ("I've got to make a *de novo* determination")); and (iii) the court of appeals (which also engaged in an *in camera* inspection of the documents) did not address the question of the appropriate standard of review in affirming the decision of the district court.

b. Although the IRS has not disputed in this case that the Freedom of Information Act authorizes a *de novo* review of the determination to withhold documents under Section 6103, the agency has contended that when its decision to withhold records is based on

unique knowledge of the needs of "federal tax administration" (26 U.S.C. 6103(e)(7)) it is appropriate for courts to give due weight in their analysis to the agency's reasoning. Even the cases on which petitioner relies have agreed with the agency on that issue. See, *e.g.*, *Linsteadt* v. *IRS*, 729 F.2d 998, 1005 (5th Cir. 1984) (IRS affidavits "must be given due weight despite our holding that an abuse of discretion standard does not apply"); *Long* v. *IRS*, 742 F.2d 1173, 1182 (9th Cir. 1984) (by holding *de novo* standard of review applicable, "[w]e * * * do not mean to imply that the Commissioner's determination is to count for nothing").

c. Moreover, under any standard of review, it is apparent that the result reached in this case would be the same. After the district court viewed the disputed documents *in camera*, the court found that the determination that disclosure would interfere with tax administration was "reasonabl[e]," was not "arbitrar[y]" and was not "in violation of law" (Pet. App. A1). In agreeing with those conclusions, the court of appeals did not find it necessary even to address which of the alternative standards of review governs in this case (*id.* at A6). Further review of the decision in this case is thus not warranted for the additional reason that a judgment of this Court on the question that petitioner raises would not alter the ultimate disposition of the controversy. As the Court has emphasized, it sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1998